AN UNSOLICITED REPORT ON LEGAL EDUCATION.

There are seven principal subjects of legal education which present difficulties, or at least demand some comment.

1. The methods of teaching law; 2. The "law" which is taught; 3. The subjects of the curriculum; 4. The size of classes; 5. The requirements for admission; 6. The relation of the teacher to the curriculum; and 7. The relation of the teacher to practice.

I.

The Methods of Teaching Law.

There are two methods of teaching law—the case-book method and the text-book method.

The Case-Book Method.

From the point of view of the student this consists in using a case-book in which selected cases are arranged in chapters and sections very much like a text-book. The important problems and frequently the historical development of subjects are presented by selected cases. The student reads each case, usually abstracting it in a note-book. He comes to class and takes notes of the analysis of the case and the discussion of the problem raised. Upon the conclusion of each chapter or section he prepares a summary from the cases and his notes. That summary is his text-book.

Students, however, come to the class-room with very different degrees of preparation. Some not only have analyzed and abstracted the cases, but have observed the problem raised and developed a mature view as to its solution and are, therefore, prepared to discuss in class the problem and the soundness of the solution which they have worked out. Others, and by far the larger portion, read the cases and abstract them faithfully, but they wait for the revelations of the class-room to secure a statement of the problem and its solution. They are, therefore, not satisfactorily prepared to carry on the discussion of the class-room about the problems which the cases raise.

From the point of view of the instructor, the case-book method of teaching presents at least one feature which should be empha-

sized. It may be assumed that the instructor has analyzed the cases, knows the points of each one, its relation to other cases and what may be said by way of approval or criticism of the result of each. It may be assumed also that he is prepared to deal with further collateral matters which should be dealt with in connection with the subject matter of the cases. In short it may be assumed that, so far as knowledge goes, the teacher is well equipped. Still the case method demands something more of the teacher. It requires a technique or art of teaching by the use of cases. This is something quite apart from legal knowledge and legal scholarship. This art or technique in general involves a discussion of the cases with different members of the class. It usually begins by one member of the class being asked to state the case. Then frequently follows a series of questions designed to improve the analysis of the case itself with a view to extracting the precise point involved or to distinguish it from some other case. In many instances the point of the case having been brought out clearly nothing more remains but to pass on to the next. If, however, the case-book is of the right sort a large proportion of the cases will raise problems. One case will stand for one proposition and another for a position inconsistent with it, so that some choice between them must be made. Here is the place for the instructor to use what may be called the art or technique of the case method of teaching. The teacher must now assume a role very like that of the cross-examiner of an expert witness. Let him imagine himself examining an expert witness as to the law of a given jurisdiction. He secures from the student a decided opinion upon the problem. Whatever it is, the instructor should be prepared to break him down. This, of course, is most frequently accomplished (if it can be accomplished at all) by putting the cases where the logical result of the position taken is incongruous or absurd, or where it seems to be because the witness does not see the way out. If the instructor can break the student expert down and force a reversal of his opinion and then start in on him again and break him down a second time, so that he is forced to admit that his first opinion was right, the instructor will score a considerable success. If the instructor can then go further and challenge any member of the class to produce a logical, workable hypothesis and if nobody can do so, and then if the instructor can himself produce a solution of the problem and in turn stand cross-examination, the session has been a decided success. The case method of teaching requires for its

success that some such processes be gone through with at least once out of every two or three lectures. The instructor must prepare definitely for this sort of cross-examining process. After all the requirements of knowledge on his part are fulfilled, he should put in a considerable amount of time and ingenuity in making that preparation.

The Text-Book Method.

When text-books are used, the class begins with a generalized statement as to the law and then may possibly work backwards into the cases cited to determine whether the generalized statement is justified by them. If this process is carried out, the student will have read the cases and formulated some generalization from them. It may even be that the instructor will go through the same cross-examining process as when the case-book is used. Many lawyers, no doubt, who learned their law from text-books, readily recall that they were taught in this way.

The explanation of the great triumph of the case-book over the text-book method of teaching law is not difficult, in the retrospect, to understand. The text-book lent itself to lazy methods on the part of the student and teacher. It was likely, by its mere form, to degenerate into the student's learning generalizations by rote and the instructor merely quizzing the student perfunctorily about them. Then the analysis and generalizations of the text-book, crystalized as they were in type, tended to become less vital. Such were probably the tendencies actually at work in the text-book method of teaching when the Harvard Law School Faculty began teaching from cases and producing case-books. The new form of the case-book and the new requirement of reading the cases first and then constructing a text after analyzing and comparing cases at once eliminated the lazy tendency promoted by the use of a text-book. Students and teachers had to do some thinking and make some fresh formulation of principles. The fresh analysis of legal problems and the fresh generalizations which the first makers of the case-books achieved in the course of their teaching and writing were far superior to those of the text-book writers of the day. It would have been surprising indeed if the text-book teaching of the seventies had survived the vitalizing features of the case-book teaching as it was first practiced at Harvard.

There is, however, no reason why the case-book method of teaching should not become quite as decadent as the text-book

teaching of the seventies. When the same case-books have been used for a good many years—when text-books have been written upon them and the notes of lectures circulated so that there is a settled text accompanying each case-book—when for a generation or more no new life has been infused into that text, students and teachers may become as lazy with case-books as they did with the text-books. The class-room exercises with the case-books may degenerate into the mere quizzing about the text which has been settled and which goes with the cases. The text itself may become old and lifeless. When such a time arrives there is little difference between the case-book method and the text-book method which the former superseded.

II.

The Law Taught.

What "law" shall the law school teach?

This need not be complicated with any philosophical discussion of what is "law", or what is "common law".

The question is entirely the practical one of what body of principles and rules should the student familiarize himself with in order to become an effective practitioner. These may be different in different jurisdictions and at different times in the same jurisdiction. However valuable it might be, the student who is to practice on the continent of Europe, would hardly devote the major portion of his time to the common law as taught at an American law school. Nor would the student who is to practice in an American jurisdiction spend the major portion of his time upon the Roman and continental law.

The practitioner as a solicitor or barrister in England has certainly always endeavored to master the principles and rules which were in effect in the English courts for the time being. The English writers upon the common law have devoted themselves to the parochial consideration of the principles and rules enforced by the English courts. They undoubtedly look upon law, so far as legal education is concerned, as the body of principles and rules announced and enforced by their courts of authority. These have been the principal sources of study for the practitioner in England.

In the United States the situation has been peculiar. During the greater part of the 19th century, the process which followed the settlement of a vast territory was the transplanting of the com-

mon law to newly settled lands. In the earlier part of the century we had the works of Kent, Story and others who re-wrote the English text-books on law as an aid to transplanting the common law. We had also the reaffirmances of the common law and modifications of it, which had occurred in the eastern states, to transplant to the western with further modifications. When Langdell began his work as a legal educator in 1869, the teaching of the common law as developed by the English courts was still the most valuable training for actual practice in an American jurisdiction. Langdell's work indicates that the law which he taught was the law as made or declared by the English courts. But the last two decades of the 19th century saw such an avalanche of decision making in courts of last resort in the many states of the Union,—to say nothing of other English speaking common-law jurisdictions—that Langdell's plan of teaching common law as laid down by English courts of authority was modified. Langdell's followers and associates began at once the construction of case-books based upon English and American cases, which presented many conflicting results. They were still most serviceable, however, in preparing students for actual practice, because in a large part of the United States the law was still in a process of making by transplanting or copying the results reached in other American jurisdictions. Text writers followed the same plan. The law publishers produced encyclopedias of law which followed the same plan. Digests of enormous proportions were issued. The West Publishing Company Reports are based to a considerable extent upon the theory that to know the law of any jurisdiction one must know the decisions of all the jurisdictions at once. Today in the United States we have a great vested interest in a general common law of the forty-seven different state jurisdictions of the country; as if, though separate and each with its own court of last resort for a large body of law, there was one law for the whole. The law schools have a vested interest in this idea because they wish to secure students upon a country-wide basis. Even professors have a vested interest in it, because their case-books are constructed upon that theory and the sales are dependent upon it. Text-book writers have a similar vested interest in the general common law. The law publishers probably have the most extensive vested interest in it, since they issue volumes which are to sell throughout the country.

Here is the vital weakness in legal education in this country today. It is no longer true that there is any practicable teachable

general common law of the United States on most subjects. The mass of decisions has swamped the law teachers, the judges and the practitioners and also the text-book writers. The time has arrived when text-book writers cannot undertake the collecting of all decisions from all jurisdictions upon the subject that they are writing about. The text-book writer cannot talk about law in any such general terms. If he attempts to cover the law of the entire country, he simply tries to write the law of each of the forty-seven different states in his text and foot notes, classifying the different variations as best he can.[1] The practical result is that judges and lawyers are of necessity being forced back to the parochial attitude of the English lawyers and judges. They are confining their attention and views to the local situation as it appears in the decisions of the local court of last resort and the local statute book. This means that legal education to be practically effective must follow the same lines. The case-book and the text-book must be developed with an eye to what the law of a single jurisdiction may be. This does not at all mean that it shall contain only local cases. It does mean, however, that the outside cases must be chosen with reference to their effectiveness in expounding the law of the particular jurisdiction. The instructor must be a master of the local

[1]Mr. Wigmore in the preface to his great work in Evidence said (at page ix):

> "The fact that there are half a hundred practically independent jurisdictions must be conceded and faced. What is the law? is a question which cannot be answered except as with fifty tongues speaking at once. What the law is in Illinois may well be not the law in Massachusetts or in California. It is time for the profession to discard the amiable pretence that precedents can be cited interchangeably. The treatise, on the one hand, is not to represent that the rule is unsettled because there are inconsistent rulings; for opposition is not inconsistency, and independence of jurisdiction leads naturally to opposition of rules. *The practitioner, on the other hand, can often expect not much more of the treatise than to furnish the materials for ascertaining what is the rule in a particular jurisdiction.* If this independence of jurisdiction be steadily recollected, three-quarters of the reproach of uncertainty disappears." (The italics are the present author's).

It was in order to furnish the practitioner with the materials for ascertaining what was the rule in each particular jurisdiction that Mr. Wigmore has, as he himself tells us in the same preface (at page ix), arranged "the rulings in the alphabetical order of jurisdictions, in chronological sequence within each jurisdiction, and by separating each group (where numerous rulings occur on the same point) by the italicized title of the State or Territory."

law so that he may indicate what cases of other states may profitably be studied as indicating the law of the local jurisdiction.[2]

The vested interests in the general common law, of course, bewail and deplore any such course of development. They say it will defeat uniformity and that the fiction of a general common law aids in keeping a desirable uniformity. But no one gets what he wants by merely wanting it. If the devotees of the general common law want it, they must have the United States Constitution amended so that there may be a uniform system of courts for the United States and a court of last resort for the whole United States. That is the only step which will produce a really uniform general common law and enable the law teachers and text writers to say what the common law is when speaking of the law of the entire United States. Of course, there is no prospect of any step of this sort in the near future. It may be that some foreign war disastrous to the United States may end our independent state governments and consolidate them all into one centralized governmental machine. When that time comes there may be a uniform system of courts in the United States and the decisions of a single court of last resort may establish a general common law for the entire country. Until that time arrives it behooves some law schools at least to face the situation as it is and shift to the basis of making the local common law in a particular jurisdiction the principal subject of instruction.

If the case-books which illustrate the problems of the local law of the particular jurisdiction are properly constructed with those leading English and American cases which are a true indication of that local law, much may be done to give the student a training quite as serviceable to him if he practice in other jurisdictions, as the present case-books are supposed to be.

Nor will there be any less training in legal reasoning from the use of properly constructed case-books designed to indicate the local law of a particular jurisdiction than is to be obtained from the present style of case-books.

Will the intensive study and analysis of the local law leave any place for a few great schools devoted to the wider generalizations of juristic thought and the development of analytic, historic, comparative, legislative, synthetic and operative processes unrelated to the law of any particular jurisdiction—a sort of inter-nationalistic law school? Perhaps so. But certainly not unless the law school

[2]The Next Step in the Evolution of the Case-Book, 21 Harvard Law Rev. 92; A Further Word in the Next Step in the Evolution of the Case Book, 4 Illinois Law Rev. 11.

which devotes itself to supergeneralizations be founded upon the intensive work of the faculties of many local law schools throughout the country and the recruiting of its faculty from such extraordinary products of the local law schools as Mr. Pound and Mr. Wigmore would have been.

III.

Subjects of the Curriculum.

Mr. Wigmore's recent plea for additions to the curriculum[3] does not, it is believed, give promise of any abundant new vitality for law teaching.

Mr. Wigmore regards the principal subjects of the present curriculum as developing mainly the "analytic process". He concedes that these courses properly handled may do something toward developing the "historic process", the "synthetic process", the "comparative process" and "operative process". It is believed that the same courses could be so handled as to do something for the development of the "legislative process" as well. But Mr. Wigmore does not advocate the use of the present conventional courses to accomplish these purposes. He would isolate the different processes and enlarge the curriculum by adding separate courses designed to develop mainly the "historic process", other courses which would develop mainly the "legislative process", and so on. No doubt his suggestions when carried out would add much that is intrinsically desirable in legal education, but the question is always one of choice and emphasis. What we really want to know is, not whether something is good in itself, but what is it that our first efforts must be concentrated upon if we are to succeed at all. What is the *sine qua non* of any success or vitality in legal education? We cannot afford ever to lose sight of that. The difficulty with Mr. Wigmore's proposals is that they tend to obscure our view of what is most important by putting other matters and plans for action between it and us. We are asked to advance when our old communications have been cut and no new base has been acquired.

The teaching of law still rests for its greatest success and vitality on the character of the teaching of those courses which Mr. Wigmore declares are of service mainly in developing the "analytic process". The Harvard Law School under Langdell

[3] 30 Harvard Law Rev. 812, 826.

and his associates incidentally put new life into the historic, the synthetic, the comparative and possibly the operative processes of legal thought, but the real basis of their successful drive in legal education was the new life and vitality which they put into the analysis of legal subjects and problems. By that means (quite as much as by any new method of teaching considered by itself) the Harvard Law School secured a leadership and a student body which has been unexcelled for many years. Whenever law teaching becomes decadent, the reviewer would do well to look at the character of the teaching of the "analytic process" courses. When that process declines, law teaching will decline. Not all the other processes combined, pushed to the utmost, will save it. When the "analytic process" in legal education revives, legal education itself will prosper.

It is with this in mind that stress has been laid in this article on "The Law Taught" as a more vital matter than the "Subjects of the Curriculum". It is the writer's belief that the renaissance of the "analytic process" and the consequent rehabilitation of legal education require the re-analysis and re-statement of the subjects of our "analytic process" law courses with reference to the decisions and statutes of single jurisdictions having a court of last resort and a legislature of sovereign authority. When that has been done it will be time to discuss the question whether the historic, legislative, synthetic, comparative and operative processes shall be developed through the medium of the same material as that which is used to develop mainly the "analytic process", or whether special courses shall be given designed to develop mainly those processes respectively and separately. To yield to Mr. Wigmore's demand for new courses at this time would leave the principal cause of decadence in law teaching untouched. It would direct the activities of law teachers away from the weak point in law teaching. It would lay out a plan of constructive effort which would require a great deal of time from an already short-handed profession. In the meantime the "analytic process" and the courses which promote it will decline still farther, and with this decline will go the influence and position of the law schools. Mr. Wigmore's leadership represents the possible course of advance for a system of legal education which is fundamentally sound and safe. It will only hasten the end of a system as ill-grounded as the present one is at the present time.

So long as the law school ideal of teaching the general common law be accepted and Mr. Wigmore's proposals for the enlargement

of the curriculum be rejected, there is not much to be said about the curriculum now in vogue. A few subjects like international law, jurisprudence and Roman law may be added and placed in an optional fourth year of study. Small disputes may be carried on as to whether one subject shall be taught in one course or in another, or whether several courses shall be divested of certain matters which can better be brought together in one course. For instance, much talk may occur as to whether the specific performance of restrictive covenants as to the use of land be treated in the first year property course under the head of equitable easement or in the course on equity jurisdiction under the head of specific performance of restrictive covenants. Shall torts and criminal law contribute certain common elements to make up a course called legal liability? Shall contracts, torts, corporations and public utilities be relieved of certain subjects in order to make up a course on contracts and combinations in restraint of trade? Shall persons or damages give way to a course on contracts and combinations in restraint of trade, assuming that all cannot be given? How far is it feasible or profitable to go in courses on practice? Should there be a general introduction as to what law is and the relation of subjects of law to each other? Should the student be introduced to legal studies by lectures upon the judicial department of government and the principles of judicial administration? Or should there be no introduction at all? These are all comparatively trivial matters. Our attention may be often directed to the inevitable tendency in teaching general common law to ignore important branches of law which have developed under the statutes. Case-books are constant reminders of the omissions of such subjects, unless the statute be one of Edward I or Henry VIII or Charles II. The omissions in this respect may not be a trivial matter, but certainly nothing can be done about it so long as the ideal persists of teaching the law of half a hundred different states as if each administered the same body of general law.

IV.

Size of Classes.

Where the case method is used, the size of the class is thought to present a problem. According to the opinion of some, a class of more than seventy-five or one hundred is too large for the case method and the classes should preferably be half that number.

This view may well follow from the teacher's desire to reach every man and stimulate every man in the class. But such an attitude on the part of a teacher is likely to destroy the effectiveness of the case method itself. The instructor is likely to become a mere quiz master, laboring with the less able students on the theory that he is stimulating them. The fact is that the practice of the class-room discussion, or the technique of case-book teaching is not possible with the men of the class who merely read the cases, abstract them, come to class prepared to state them, and whose attitude of mind is then to wait for the lecture and discussion to inform them of the problem and its solution. Such men may be first class students and may secure the highest marks in examinations, but an instructor cannot conduct the case-book method of teaching very well with them. They come to the class prepared to write down what is said. They are not there prepared to discuss and argue. They are, as a result of their own partial preparation, the gallery, the audience, before whom the discussion with others is staged. That discussion is carried on with the men who have not only read and abstracted the cases but have seen the problem raised and have formed an opinion about its solution or worked out a basis of distinction between the cases which they are prepared to defend. In any class such men are comparatively few—twenty per cent. would be a high average. In a class of forty it would give the instructor eight men. In a class of 250 it will give him fifty. Of the two the class of 250 is far preferable. The discussion with the fifty prepared men of the large class will be better as a general rule than the discussion with the eight prepared men of the small class. This follows from the mere difference in numbers alone. Then the presence of a large gallery is more stimulating than that of a small one. The small class generally tends to let the instructor down. The large class keeps him up to his highest pitch of effort at all times. The small class and the large class will have their advocates, but the difference between them will, it is submitted, depend more on the instructor's temperament and aim in teaching, than on any dogmatic rule that can be laid down for guidance.

Up to this point we have proceeded upon the hypothesis that the large class maintained a high percentage of students who were prepared for the case-book method of discussion. Suppose, however, that in a class of 150 or 200 the standard of effort is such that only six to ten men are produced who are, as a result of their

own initiative, prepared for the best sort of class-room discussion. This is a number too small to warrant real class-room discussion with a few for the benefit of 140 or 190 others. The gallery is too large in proportion to the actors. In that case it would be better no doubt to cut the class in half and conduct it with a little dash of drill-sergeant energy with a view to bringing individual members up to a respectable standard of class-room discussion.

V.

Requirements for Admission to Law Schools.

The Harvard Law School was forced by the numbers demanding entrance to discriminate between those it would take and those it would not. Any one of several tests might have been adopted. The securing of a college degree was found to be a satisfactory requirement, insuring a certain maturity and preliminary education on the part of the student. It should not be overlooked, however, that it was *not* the requirement of a college degree that made the Harvard Law School student. It was the fact that the Harvard Law School had something vital and unusual to offer in the way of legal education that brought to it the men who have made its extraordinary student body. The requirement of a college degree was merely the outcome of a demand by so many for entrance to the school that some had to be cut off and denied admission.

This simple order of events seems to be overlooked. Schools have tumbled over themselves to place the requirement of a college degree upon admission on the supposition, apparently, that this would improve the personnel and standing of the student body.

Is such a hope justified?

When a law school has something unique to offer,—when it has a monopoly through the assembling of talent and efficiency in teaching and scholarship,—so that there is a greater demand for entrance to the school than can be accommodated, the raising of entrance requirements by requiring a college degree may in fact improve the personnel of the students and aid in preserving the predominant influence of the school. But how is a school to put itself in the position of offering something unique—something in which it for the time being has a monopoly? It cannot do so today merely by the use of the case method or copying the teaching of the Harvard Law School. It cannot do so by adding courses on jurisprudence and Roman law, or courses designed mainly to de-

velop the historic, legislative, synthetic, comparative and operative processes respectively and separately. In the opinion of the writer it is to be secured by a school which devotes such talent as the Harvard Law School Faculty possessed thirty years ago to an intensive study of the local law of a particular jurisdiction of importance, and the winning by at least a majority of the members of the faculty of a position at the bar as advocates retained by other lawyers in the handling of legal problems with which their teaching makes them familiar.

Suppose then a school has nothing unique to offer—suppose it has no monopoly of talent or of efficiency and no unique or unusual idea to work with, and no extraordinary student body to start with. Suppose it is just a mediocre school with a following of mediocre students using the Harvard Law School case-book and case-book methods of teaching. What will probably be the effect of a drastic raising of entrance requirements? Will it improve the student body, or will it in substance destroy the school? It is believed that in general it will do the latter, at least to such an extent as to play at once into the hands of the low standard night school. This is hardly a satisfactory result. The teaching of a small group of college graduates can hardly be offset against the loss of sending large numbers of men, among whom are future judges and successful practitioners, to an inferior school. The result may be pleasant for the instructor at the endowed school which can stand the expense of maintaining a faculty to teach a few college graduates, but the result on the whole is not desirable.

The only way for such a school to proceed is to develop its influence over numbers. It should spread its influence through teaching numbers rather than seek to improve the quality of the very few. The numbers which such a school is to influence must be gained by presenting *facilities*. It may develop a day school for college graduates and the night school in order to secure other men and to compete successfully for those it would otherwise lose. In other words, it may run a two-standard school. If there are several endowed schools in a given locality, each of which is trying to run a graduate school in the daytime, they should combine for the purpose of running a really good night school in order to reduce the influence of the inferior night school and to increase their own.

VI.

The Relation of the Teacher to the Curriculum.

The relation of the law teacher to the curriculum is unsatisfactory because of too much rotation among different subjects and because of too little. Some law teachers, especially those who have changed frequently from one school to another, properly complain that they have been called upon so frequently to change the courses which they teach that they have never had a chance to master any of them in a satisfactory way. Others who have stayed many years in the same school have reason to complain that they have been stuck too many years with the same courses till the subjects have become worn out and stale and the teaching consequently distasteful. A systematic effort to avoid both difficulties may be undertaken by making four groups of courses and then assigning two or three instructors to each group and requiring some rotation by each instructor in a given group among all the courses of the group.

It is clear that criminal law, torts, evidence and common-law pleading and practice will fall in one group. This would be the group of subjects that has most to do with jury trials. Damages might rather arbitrarily be assigned to this group. A second group would clearly include the commercial law courses, such as contracts, sales, suretyship, bills and notes, agency, personal property, conflict of laws, bankruptcy, partnership and corporations. These courses on the whole deal with the substantive law most in use in commercial transactions. A third group would take in the three courses on property, two courses on equity jurisdiction, mortgages, equity pleading and practice, and trusts. Persons might rather arbitrarily be assigned to this group. A fourth group would contain the subjects relating to government. It should include the judicial departments of the state and federal governments, state and federal constitutional law, municipal government, municipal corporations, public utilities, taxation, practice before commissions and taxing bodies, interstate commerce, federal jurisdiction, international law, and practice before international tribunals.

The first group should have two professors. If the school be large so that the courses might be divided into two sections, they will have their hands full. If the school be smaller, it would still be advisable to have two professors for the first group, even

though one of them might devote part of his time to the courses in some other group. The second group should certainly not have less than two professors and possibly three. The fourth group should be in charge of two professors.

The administrative advantages of such a plan would be considerable. With two or three men for each group, the number of courses that each would have to give in any year would not be too large, and yet the knowledge that the teacher must prepare to give a new course the next year or after two years would stimulate an interest outside of the courses given. In time, when two or three men had given all the courses in a given group, their reactions upon each other would be beneficial to themselves and to the students. Furthermore, if any one was absent through illness or any other cause, there would always be a man ready who could step into his place at a moment's notice. A school so organized would be less likely to be left short-handed. At the same time the dry rot which comes over a course when one man gives it year after year indefinitely might be avoided.

VII.

Relation of the Teacher to Practice.[4]

The relation of the law teacher to practice is perhaps of more importance today than any other problem of legal education, unless possibly it be the question of what law shall be taught.

With the advent of Langdell and his associates, the law teacher who was a practitioner steadily declined. Langdell's associates gave up practice, or else they went from the classroom to the teacher's chair with no experience in practice or a mere apprenticeship in practice for a few years. The results justified this course. There was then a great pioneer work to be done. The case-books were to be made, a new life was to be given to legal formulae and principles and the analysis of legal subjects and problems. Competition, which is the final arbiter of the value of ideas, gave the wreath of victory to the law teachers generally who did not practice over those who did. This has been held to establish a rule—almost a corollary to the case method of teaching itself,—that the law teacher should not practice. To some extent it has been accepted that the law teacher never needed to have practiced. The recent brilliant graduate may be taken and made into

[4]Should the Law Teacher Practice Law?, 25 Harvard Law Rev. 253.

a law teacher after a brief apprenticeship in an office. But whether accepted consciously or not, the fact is that most of the law faculties in endowed schools which have adopted the case method, have for the last twenty years been organized more and more as if some one had articulated and enforced the fundamental rule that the law teacher should not practice, and that recent graduates may become first class law teachers without ever having practiced. The result is that the most conspicuous thing about the law teachers of today is that they do not compete with anyone. They do not compete with an old system of teaching as did Langdell and his associates. That contest has been won. They do not compete with each other in any lively sense because the positions of all are permanent and the salaries secure. The fact that they do not practice is only another way of saying that they do not compete with the members of the bar in the slightest degree.

One member of the Langdell group said little, if anything, about the law teacher giving up practice, but he plainly refused to accept such action as the expression of a permanent and final policy. This was John C. Gray. Mr. Justice Loring, for many years Mr. Gray's partner, in an address delivered at Mr. Gray's death has told us why Mr. Gray remained in practice. Speaking at a meeting of the Bar Association of Boston and the Supreme Judicial Court of Massachusetts to honor Mr. Gray's memory, the Justice said:

> "When Mr. Gray in 1875 accepted a professorship in the Harvard Law School, he deliberately chose that as his career for life. He continued in active practice, to be sure; but he continued in practice because he thought that if he was in touch with the realities of litigation and of affairs, he would be a better teacher of law. So much I have from Mr. Gray himself. * * * He was the better teacher for being in active practice; he was the better lawyer from the learning which came from teaching law."

Mr. Gray was right. As a permanent policy, the divorce of the law teacher from practice is impossible. The extent to which it has already been carried bids fair to bring ruin to the law teaching profession and to the law schools, and to bring the great work of Langdell and his associates to an end—to say nothing of the incalculable injury it may do to the legal profession in the United States by depriving it of the training which the law schools can give. The courts, especially the courts of last resort, are the ultimate

expounders or makers of the law. The courts, especially the courts of last resort, are the laboratories where legal generalizations are brought to the final test. Law teachers who do not take part in the submission of their views to the courts, who do not work them out in an intensive manner before courts and against able counsel, miss a training and a contact with law in the making and development, which the teaching profession can not afford to do without. Indeed, what man or body of men can be kept up to a proper pitch of effort or development without competition with someone? You might as well try to develop a football team without having any games, as to run a law faculty with all competition between its members and the members of the bar eliminated.

The law teacher needs to compete with the bar to prove that at least in his narrow field of effort he is equipped to speak with authority to lawyers at some bar and the judges of some court. He needs this for the improvement of his place among lawyers and judges, and to dispose of the general contempt in which law teachers are held by lawyers and judges. First class men cannot be recruited to a professional group which has not a first class standing in the profession to which it belongs. Law teachers need to compete with the practitioner in some degree for the sake of their own mental health. For a few years a law teacher can work enthusiastically and effectively, but the constant repetition of courses with the same cases and the same discussions will sooner or later put him on edge and undermine his mental health. If there be added the writing of extensive text books and the collecting and digesting of masses of cases, he can hardly avoid a nervous breakdown. Indeed the more active, energetic and ambitious the law school teacher is, the more likely he is to suffer. A reasonable amount of change from intensive academic work to the application of the law to a given case or debate before a court is of incalculable advantage to the law teacher, just as a change from the strenuous work of litigation to the relaxation of academic work is a relief from practice.

How is this combination of law teaching and practice to be achieved?

In the *first* place it must be made clear that the law teacher is not to be taken from among practitioners who continue to practice. On the contrary the law teacher whose profession is principally law teaching must achieve a practice and a position at the bar. Like Mr. Gray he must go into law teaching as his life work; he

must practice for the training which is necessary for the best performance of that life work.

Second: The law teacher must be restricted in his practice to advocacy. This may be done by the rules put upon his practice by the school, the enforcement of which should be placed in the hands of the Dean. He should be permitted to appear in causes only when retained by another lawyer. That cuts him off at once from the whole business of client care-taking. He may be consulted in non-litigated business or he may be retained to argue or conduct a particular case which is largely prepared by the lawyer employing him. But no law teacher should regard himself as having an advocate's practice when other lawyers seek merely to secure from him the services of a brief-writing hack. Under such restrictions the danger is not that the law teacher's practice will interfere with his teaching, but that he will not have any practice at all. Indeed it may safely be said that he will certainly have no practice unless he prepares himself by special efforts which the law teachers do not now make.

Third: The fundamental condition precedent to the law teacher acquiring an advocate's practice is that he become a master of the local law in the subjects which he teaches. If the plan of assigning teachers to related groups of subjects obtain, this means that the teacher will master the local law in all the subjects of his group, and will by that means have a sound basis for a specialist advocate practice.

If two or more men rotate among the courses of a given group, they will work together in mastering the local law of that group of subjects, and will be of great assistance to each other in practice.

The publication of their efforts will inform the local bar and the judges of their qualifications, and their comments on recent cases will make them the leaders in those branches of law which belong to the group of subjects which they teach, and should impress the lawyers and judges with the fact of their leadership.

For those who take up the subjects which form the basis of an equity practice or a commercial law practice, ten or twelve arguments a year will be a large number. The arguments will be largely on law points and they can step easily from the classroom to the court-room. For those who take up evidence, criminal law and torts, some experience in jury trial cases must be obtained. The conduct of jury trials must be undertaken. This can be done by

the instructor obtaining an appointment as assistant state's attorney or being employed in the trial department of a traction company during a period when he is given a leave of absence.

Opportunities to practice should constantly increase as a result of the attitude of the alumni of the school towards its instructors. The time may come when influential alumni at the bar may take quite as much interest in seeing that the law teacher has a chance to show what he can do in practice as they now expend in recommending young men to enter the school in question.

Fourth: It will now be observed that the group plan of courses and the assignment of two or more instructors to a group will make it far more possible for a teacher to engage in practice as an advocate than is now practicable under a system which provides one man to a course with nobody else willing or able to take his place when called upon.

Fifth: If any law teacher becomes too popular as a practitioner (which is entirely unlikely, at least for a long time after he has become a teacher) he may raise his fees. The cases which he takes may be, to some extent at least, under the control of the Dean. In this way he may be forced to restrict his practice to the point where the law school does not suffer, or he may resign. The spectacle, however, of the law teacher advocate who resigned because his advocate's practice was so large and lucrative, would give the law school in question an enviable prestige. If such a step by its teachers became common, places on its faculty would be prized as highly and sought for by ambitious men as eagerly as the places upon our most eminent courts.[5]

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[5]The following form is recommended as expressing an arrangement between a law school and a teacher who is to practice:

INDENTURE made this ..... day of ....., 1917, by and between ....., (on behalf of the University of .....) party of the first part, and ...., party of the second part, WITNESSETH that,

WHEREAS, the first party is desirous of obtaining the services of the second party as a teacher of law in the University of ..... Law School, and particularly as a teacher of the law of Future Interests, and

WHEREAS, said first party fully realizes that the services of the said second party cannot be obtained by the offer of a mere reward of money to be paid the second party but only upon said reward coupled with the opportunity of the said second party to obtain a position of authority, dignity and importance in the community of lawyers and teachers which the said law school more immediately serves, and

WHEREAS, the said first party now fully realizes that unless a considerable proportion of the members of every faculty of law teachers are permitted, encouraged and even, in some instances, required to secure and maintain a position of authority, dignity and importance among lawyers and judges in the community which the law school more immedi-

Sixth: Under such a plan a law school faculty would become a new sort of firm of lawyers—a group of legal specialists equipped to hold their own in practice and bringing into practice their academic deductions and opinions. The bench and bar and law schools sadly need the fresh breeze that such a group would create.

Seventh: But where can any such law faculty be recruited? With a few possible exceptions, certainly not among the men now teaching law. A new sort of law teacher must be created, just as Langdell had to create teachers of a new stamp to introduce the case-books. It is suggested that out of the twenty best students of each of the last five graduating classes of the Harvard Law School, there might (barring the war) be found five able enough, ambitious enough, and strong enough, who were willing to leave their training camps for client care-taking to enter one where a mastery of the law in a related group of subjects was to be used as

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ately serves, by reason of the fact that such law teachers successfully compete with both the lawyers and judges in the branches of law which, as teachers, they respectively make particularly their own, the law teachers must deteriorate and their position in the community becomes such that self-respecting and ambitious men will not enter the law-teaching profession, and that it will be filled, for the most part, with a characteristically non-competing class who must take such position in the community and among lawyers as those who do compete are unwilling to strive for;

NOW THEREFORE, the party of the first part in consideration of the premises does promise and covenant that the party of the second part shall not only be permitted and encouraged, but shall be ***required*** to practice law subject to the restrictions and limitations hereinafter provided and to succeed therein upon the pain and penalty of having his salary reduced or having all advances in salary denied if he does not succeed.

The restrictions and limitations upon the practice of said party of the second part hereinabove referred to shall be as follows:

(1) The party of the second part shall not engage in practice except as he may be retained by other lawyers for consultation in non-litigated matters, or to conduct or aid in the conduct of litigation.

(2) That the second party, without the consent of the first party first obtained, shall not accept as compensation for his services less than Fifty Dollars ($50) per day.

(3) That the second party shall not, without the consent of the first party first obtained, engage himself in the conduct of any litigation which involves on his part his presence at continuous day to day hearings before a court for more than three (3) days at a time.

(4) That if, in spite of the fact that the above restrictions are faithfully adhered to, the party of the first part shall find that the teaching work of the said second party suffers by reason of his being so engaged in the practice of the law, said first party may call upon the second party to raise his fees to a sum not exceeding Two Hundred Dollars ($200) per day or to resign from the faculty.

The party of the first part also covenants and agrees that, subject to the above restrictions and limitations, he will aid and use his influence and the position and influence of the school, so far as he may command it,

the foundation not only of successful teaching but also of an advocate's practice in the courts and a position of authority and weight with lawyers and teachers. It is a well known fact that many of the ablest law school graduates who make little headway in the rookeries of the client care-takers, and begin after five years to find it out, are admirably fitted to distinguish themselves in the career which is here outlined.

CONCLUSION.

The law schools, if they do not already, will soon need some new idea to vitalize and revive their teaching and influence. It is the writer's belief that this will not come from the supergeneralizations of jurisprudence or the study of foreign systems of law, or from

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with the graduates thereof practicing at the bar in ..... and elsewhere and with other lawyers, to secure for said second party an opportunity to be retained in litigated cases dealing with the subjects which he handles in the school as a teacher, to the end only, however, that the said second party may have a fair opportunity to demonstrate to the members of the bar that his services are worth securing at the minimum price above mentioned.

The first party also covenants and agrees that in case of the success, —even a very moderate success,—on the part of the second party in practice under the above limitations and restrictions, the said second party shall be entitled to all the considerations, emoluments and dignities now accorded to members of the faculty who give all their time to teaching and do not practice in any degree.

The second party on his side agrees to devote himself primarily to the teaching of such courses at the University of ..... Law School as shall be mutually agreed upon, including the course on Future Interests, otherwise known as Property III, and to observe all the restrictions and limitations upon his practice above set forth.

The second party further covenants and agrees that, next after the faithful preparation of said courses and teaching them, he shall equip himself for the practice of law primarily in the State of ....., subject to the restrictions and limitations above set forth, by collecting, analyzing and synthetically assembling in a first class text-book the decisions of New York, Michigan, Wisconsin, Minnesota and California upon the subjects of Future Interests and Perpetuities, more or less common to all of said States by reason of their having copied to a substantial extent the New York Statute of Perpetuities, and by collecting, classifying and arranging the decisions of the Supreme Court of ..... relating to all the subjects which the second party teaches.

The second party further covenants and agrees that he will in all respects possible and consistent with his duties as a teacher seek to compete with the lawyers and judges of the state of ..... and to demonstrate to them that in certain branches of the law and in the application of the principles relating thereto his opinions and views have a standing which cannot be ignored or overlooked by either the judges or practicing lawyers.

IN WITNESS WHEREOF we have hereunto set our hands and seals the day and year first above mentioned.

..... [SEAL]
..... [SEAL]

an enlargement of the curriculum by courses which mainly develop the historic, legislative, synthetic, comparative, and operative processes respectively and separately. It will come from a parochial attention and intensive analysis of the law of some particular jurisdiction, together with the maintenance of a position at the local bar as an advocate by the majority of the teachers of a given faculty. Along with these radical departures from the present fundamental tents of law schools will necessarily go modifications in the case-books, in the curriculum and in the relation of the teacher to the curriculum.

Where is this new movement to come from? It is difficult to tell. The vested interest in the general common law is greatest in the largest and most successful of our law schools today. It is hardly conceivable that they should take a step which would tend to destroy what at the moment is perfection. The new experiment may be expected from one of the schools which has been less successful.

Furthermore, the geographical location of the school which is to make the experiment must probably be contiguous to, or in the midst of, a great center of population, and in a state which has a legal history and reports extensive enough really to enable a body of men to build a comprehensive system of law from them.

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